Supreme Court, U.S.
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In the Supreme Court of the United States
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BEVERLY ENTERPRISES-ILLINOIS, INC.,
D/B/A VIP MANOR, PETITIONER

v.

MARTHA BLAZIER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF RACHEL REEDY, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Illinois Nursing Home Care Act (INHCA) renders "null and void" any "waiver by a resident [of a nursing facility] or his legal representative of the right to commence an action" to enforce INHCA and any "waiver of the right to a trial by jury" executed prior to the commencement of any such action. 210 Ill. Comp. Stat. 45/3-606, 3-607.

The court below held that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section of the [INHCA] targeted arbitration agreements, but a class of contractual agreements generally, whether arbitration or not, that effected a waiver of a nursing home resident's right to either commence an action or assert the right to a jury trial" (App., *infra*, 4a). The questions presented are:

1. Whether a state statute precluding the enforcement of arbitration agreements related to a single category of disputes may supersede Congress's declared policy requiring enforcement of arbitration agreements.

2. Whether a state statute must specifically target arbitration agreements in order to be preempted by § 2 of the FAA or whether it is sufficient if the state statute as applied precludes any and all arbitration of disputes between private parties.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Beverly Enterprises-Illinois, Inc., doing business as VIP Manor, is a California Corporation in good standing, wholly owned by Beverly Health and Rehabilitation Services, Inc., which is not a publicly held company. No publicly held company owns a ten percent or greater ownership interest in petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Beverly Enterprises-Illinois, Inc., doing business as VIP Manor, respectfully submits this petition for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District in this case.

OPINIONS BELOW

The opinions below include the Order of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, dated December 20, 2007, denying Petitioner's motion to compel arbitration (App., *infra*, 1a); the Summary Order of the Appellate Court of Illinois, Fifth District, dated December 22, 2008, affirming the trial court's order (App., *infra*, 3a); the

Order of the Appellate Court of Illinois, Fifth District, dated January 28, 2009, denying Petitioner's motion for rehearing (App., *infra*, 6a); and the Order of the Supreme Court of Illinois, dated September 30, 2009, denying Petitioner's petition for leave to appeal (App., *infra*, 8a). Each of these decisions is unreported.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on December 22, 2008 (App., *infra*, 3a). The Supreme Court of Illinois denied Petitioner's petition for leave to appeal on September 30, 2009 (App., *infra*, 8a). The jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising

> out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Illinois Nursing Home Care Act (INHCA) provides, in pertinent part:

> § 3-606. Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.
>
> § 3-607. Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

210 Ill. Comp. Stat. 45/3-606 and 3-607.

The Commerce Clause of the United States Constitution, as well as other provisions of the FAA and INHCA, are reprinted in the appendix to this petition (App., *infra*, 9a-12a).

STATEMENT

In enacting § 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v.*

Keating, 465 U.S. 1, 10 (1984). This Court recently reaffirmed what had already been "well-established" and "repeatedly reaffirmed": § 2 of the FAA preempts conflicting state law in proceedings before state courts. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland*, 465 U.S. at 15-16).

The Appellate Court of Illinois ignored this Court's well-established FAA jurisprudence, holding that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section of the [INHCA] targeted arbitration agreements, but a class of contractual agreements generally, whether arbitration or not, that effected a waiver of a nursing home resident's right to either commence an action or assert the right to a jury trial." (App., *infra*, 4a).

The ruling of the Appellate Court of Illinois is patently erroneous and conflicts with a long line of this Court's precedent holding that the FAA preempts state laws such as INHCA.

1. Rachel Reedy was a resident of VIP Manor, a nursing home operated by Petitioner in Wood River, Illinois. Upon her admission to VIP Manor on November 9, 2005, Ms. Reedy signed an Arbitration Agreement (App., *infra*, 13a-17a). The Arbitration Agreement requires that a broad range of disputes be subject to arbitration:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as

> "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration[.]

(App., *infra*, 13a). The Arbitration Agreement is applicable to all plaintiffs who bring a claim on Reedy's behalf:

> It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident.

(App., *infra*, 15a). The Arbitration Agreement expressly provides that the agreement is governed by the Federal Arbitration Act:

> The parties to this Arbitration Agreement acknowledge and agree that upon execution, this Arbitration Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

(App., *infra*, 13a-14a). The Arbitration Agreement further provides:

THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this Arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

The undersigned certifies that he/she has read this Arbitration Agreement and that it has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the

> Resident or otherwise to execute this agreement and accept its terms.

(App., *infra*, 15a-16a) (emphasis in original). Additionally, the Arbitration Agreement expressly states in two places that signing it is not a condition of admission: First, the document is entitled:

RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)

(App., *infra*, 13a) (emphasis in original). Second, the Arbitration Agreement acknowledges, "The Resident Understands . . . execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the facility." (A17).

2. Ms. Reedy passed away after her admission to Petitioner's nursing home. Thereafter, Martha Blazier, Special Administrator for the Estate of Rachel Reedy, filed a civil action against Petitioner in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. In her two-count complaint, Ms. Blazier brought claims pursuant to the INHCA and the Illinois Wrongful Death Act (App., *infra*, 21a-29a). The Complaint alleged Petitioner failed to provide adequate care to Ms. Reedy and that Petitioner's acts or omissions resulted in Ms. Reedy's death.

3. Petitioner moved to compel arbitration, filing an affidavit in support of its motion setting forth facts establishing the arbitration agreement involved interstate commerce within the meaning of the FAA (App., *infra*, 18a-20a). Ms. Blazier neither challenged this evidence nor produced any evidence

to the contrary. Instead, she argued that the arbitration agreement were void and unenforceable under INHCA.

4. The Circuit Court denied Petitioner's motion to compel arbitration (App., *infra*, 1a-2a). The Circuit Court concluded that the arbitration agreement was unenforceable because "the Federal Arbitration Act (9 U.S.C Section 2) does not preempt the provisions contained in the [INHCA] which specifically prohibit both a waiver of a right to sue and a waiver of the right to a trial by jury in cases brought pursuant to the [INHCA]." (App., *infra*, 2a) (emphasis in original).

5. The Appellate Court of Illinois affirmed the Circuit Court's ruling (App., *infra*, 3a-5a), holding that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section of the [INHCA] targeted arbitration agreements, but a class of contractual agreements generally, whether arbitration or not, that effected a waiver of a nursing home resident's right to either commence an action or assert the right to a jury trial." (App., *infra*, 4a). It's reasoning was based entirely on its prior ruling in *Carter v. SSC Odin Operating Co., LLC*, 381 Ill.App.3d 717, 885 N.E.2d 1204 (Ill. App. 5th Dist. 2008), cert. denied, 129 S.Ct. 2734, ___ U.S. ___ (2009) (No. 08-805)[1].

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[1] The arguments raised in this Petition for Writ of Certiorari are substantially similar to those raised in the Petition for Writ of Certiorari prepared by counsel for SSC Odin Operating Co. in the *Carter* case. Although this Court denied the *Carter* Petition, the Illinois Supreme Court has since vacated its prior denial of SSC Odin Operating Co.'s petition for leave to appeal and allowed the appeal. *See Carter v. SSC Odin Operating Co., LLC*, No. 106511 (Ill. Sup. Ct., August 7, 2009). The Illinois

6. The Appellate Court of Illinois denied Petitioner's motion for rehearing. (App., *infra*, 6a).

7. The Supreme Court of Illinois subsequently denied Petitioner's petition for leave to appeal (App., *infra*, 8a).

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to ensure the proper and uniform application of the FAA. The lower court's decision stands in direct conflict with this Court's decisions in *Preston* and *Southland*, both of which demonstrate that a state statute need not "target" arbitration agreements in order to be preempted by § 2 of the FAA if the state statute, as applied, precludes the enforcement of arbitration agreements. The unanimous rulings of four federal circuit courts of appeals provide further evidence that the ruling below is patently erroneous.

Moreover, as this Court recognized in *Southland*, the "public policy" logic of the decision below would allow States to "wholly eviscerate" federally protected arbitration rights. *Southland*, 465 U.S. at 17 n.11. The decision below held that States may enact statutes that have the effect of precluding the enforcement of arbitration agreements so long as the state statute does not

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Supreme Court has since denied petitions for leave to appeal lower court decisions which refused to enforce arbitration agreements based exclusively on the precedent established by *Carter*. *See Blazier v. Beverly Enterprises-Illinois, Inc.*, No. 108114 (Ill. Sup. Ct., September 30, 2009) (App., *infra*, 8a) and *Mitchell v. Beverly Enterprises-Illinois, Inc.*, No. 108115 (Ill. Sup. Ct., September 30, 2009). These actions suggest the Illinois Supreme Court intends to affirm *Carter* and solidify Illinois state law in contravention of the Federal Arbitration Act and this Court's prior rulings.

expressly mention arbitration. This Court considered—and expressly rejected—that argument in *Southland*, holding that Congress's pro-arbitration policy choice supersedes any contrary policy choice made by a State.

Accordingly, the Court should grant the petition for a writ of certiorari and, as it has done under similar circumstances, summarily reverse the judgment of the Appellate Court of Illinois. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (per curium) (reversing summarily state supreme court ruling imposing an unduly narrow interpretation of the FAA's "involving commerce" requirement because this Court's decision fell "well within [its] previous pronouncements"). Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits, and reverse the judgment of the Appellate Court of Illinois.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNAMBIGUOUS PRECEDENT ADDRESSING THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

A. *Preston* and *Southland* Demonstrate That a State Statute Need Not "Target" Arbitration In Order to be Preempted and that the Logic of the Court Below Is Invalid

Section 2 of the FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, 128 S. Ct. 978, 981

(2008). For example, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *Id.* at 987.

In *Preston*, an actor and his manager had agreed to arbitrate disputes arising under a management contract. *See id.* at 982-83. The plaintiff-manager later claimed that he was owed fees under the contract, but the defendant-actor claimed the contract was void because the plaintiff-manager was acting as an unlicensed talent agent. *See id.*

California's Talent Agencies Act specified that "[i]n cases of controversy arising under this chapter, the parties involved *shall* refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo." Cal. Lab. Code Ann. § 1700.44(a) (West 2003 & Supp. 2008) (emphasis added). Following the procedure prescribed by the state statute, the defendant-actor petitioned the state labor commissioner to decide whether the contract was unenforceable because it violated a state law requiring licensure of talent agents. *See Preston*, 128 S. Ct. at 982-83. The plaintiff-manager moved to compel arbitration, but the California Court of Appeal eventually refused to do so because it believed the FAA did not preempt actions before an administrative agency with exclusive jurisdiction over a dispute. *Id.*

After the Supreme Court of California denied the plaintiff-manager's petition for review, this Court

granted the plaintiff-manager's petition for a writ of certiorari and reversed the judgment of the California Court of Appeal, finding that the issue was simply "who decides whether [the plaintiff-manager] acted as personal manager or as a talent agent." *Id.* at 987. In reversing the California Court of Appeal, this Court concluded that the motion to compel arbitration raised solely the question of which forum would hear the parties' dispute and the parties had not forfeited any substantive claims under the statute. *Id.* They were merely submitting to resolution in an arbitral, rather than a judicial or administrative, forum. *Id.* In other words, the parties had not waived causes of action under the state statute; instead, they had agreed who would decide such issues, and that "who" was an arbitrator.

As the Court itself acknowledged, the holding of *Preston* was hardly groundbreaking. *See id.* at 984 (recognizing that existing precedent "largely, if not entirely, resolve[d] the dispute before" the Court). This Court faced a similar question almost twenty-five years earlier in *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

In *Southland*, a California statute designed to protect franchisees contained an anti-waiver provision similar to those at issue here, which stated that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." *Id.* at 10 (citation omit ted). Like INHCA's anti-waiver provisions and the state statute at issue in *Preston*, the state statute in *Southland* did not expressly mention arbitration. Despite that fact, the *Southland* Court reversed a Supreme Court of

California decision refusing to compel arbitration, finding that the FAA withdraws the "power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 12.

Moreover, the opinion for the Court in *Southland* expressly rejected the theory adopted by the Appellate Court of Illinois in the case below. In recognizing that § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2 (emphasis added), the Court explained that § 2's savings clause did not allow state legislatures to countermand the pro-arbitration policy choice made by Congress.

In particular, the opinion for the Court responded to the dissenting opinion of Justice Stevens, which, applying the same rationale adopted by the Appellate Court of Illinois here, stated in relevant part:

> A contract which is deemed void is surely revocable at law or in equity, and the California legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Disclosure Act, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California Act, I

> believe this declaration of State policy is entitled to respect.
>
> * * * * *
>
> We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the [FAA], can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government.

Southland, 465 U.S. at 20-21 (Stevens, J., dissenting).

In response, the opinion for the Court in *Southland* expressly rejected the dissent's reasoning adopted by the Appellate Court of Illinois here, stating in relevant part:

> JUSTICE STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of any contract." We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of any contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this dissenting view, "a state policy of providing

> special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute." If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts . . . simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

Southland, 465 U.S. at 16-17 n.11 (citations omitted; ellipses in original).

Despite this Court's decision in *Southland*, the Appellate Court of Illinois held that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section of the [INHCA] targeted arbitration agreements, but a class of contractual agreements generally, whether arbitration or not, that effected a waiver of a nursing home resident's right to either commence an action or assert the right to a jury trial." (App., *infra*, 4a).

B. The Decision Below Is in Conflict with *Perry* and *Casarotto*

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court was asked to decide whether § 2 of the FAA preempted § 229 of the California Labor Code. On its face, the state statute in question "singled out" arbitration agreements, providing that suits for the collection of wages could be maintained "without regard to the existence of any private agreement to arbitrate." *Id.* at 484 (quoting Cal. Lab. Code Ann. §

229 (West 1971)). The Court found that the pro-arbitration policy of the FAA placed it in "unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes." *Id.* at 491. As a result, the Court held that the state statute had to "give way" under the Supremacy Clause. *Id.*

In finding the state statute preempted, the opinion for the Court included a footnote reading, in relevant part:

> In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law, see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Nor may a court rely on the uniqueness of an

> agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Id. at 492 n.9 (citations omitted).

Several years later, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court held that the FAA preempted a Montana statute conditioning the enforceability of arbitration agreements on compliance with a first-page notice requirement. As in *Perry*, the state statute at issue in *Casarotto* "singled out" arbitration by making arbitration clauses "unenforceable unless '[n]otice that [the] contract is subject to arbitration' is 'typed in underlined capital letters on the first page of the contract.'" *Id.* at 683 (quoting Mont. Code Ann. § 27-5-114(4) (1995)) (brackets supplied by *Casarotto* Court). In finding the state statute preempted, the Court referenced the *Perry* footnote and explained that, under the savings clause of § 2 of the FAA, courts could not "invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.* at 687.

Read correctly, *Perry* and *Casarotto* stand for the proposition that § 2 of the FAA preempts those state laws that "single out" arbitration agreements for special treatment. As demonstrated by *Southland* and *Preston*, however, *Perry* and *Casarotto* do not stand for the converse proposition: namely, that state laws avoid FAA preemption so long as they do not "single out" arbitration agreements for special treatment. Instead, *Southland* and *Preston* make clear that state

statutes are preempted by the FAA if the state statutes *as applied* preclude the enforcement of federally protected arbitration rights, regardless of whether the state statutes "single out" or "target" arbitration agreements. The decision of the Appellate Court of Illinois is predicated on a misunderstanding of this fundamental concept.

II. THE DECISION BELOW CONFLICTS WITH THE LAW OF FOUR FEDERAL CIRCUITS ADDRESSING THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

In relevant part, § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Contrary to the decision below, the federal courts of appeals have unanimously held that the FAA preempts a state law that invalidates only certain types of clauses in some, but not all, contracts, regardless of whether the state law mentions arbitration. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (per curiam); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999) (No. 98-630).

In *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), the Ninth Circuit was asked to decide whether the FAA preempted a California statute that had the effect of voiding forum-selection

clauses in franchise agreements if the clauses restricted venue to an out-of-state forum. *See id.* at 889.[2] Relying on decisions from the First, Second and Fifth Circuits, the Ninth Circuit held that § 2 of the FAA preempted the California statute because the California statute applied "only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'" *Id.* at 890 (quoting 9 U.S.C. § 2).

In *Bradley*, the appellee-franchisees contended — like the Appellate Court of Illinois in this case — that the California statute was not preempted "because it treats arbitration and litigation equally and does not single out arbitration as a disfavored form of dispute resolution." *Id.* at 889. The Ninth Circuit rejected that argument outright, holding that "only state law that addresses the enforcement of 'contracts generally' is not preempted by the FAA." *Id.* (quoting *Casarotto*, 517 U.S. at 686-87). As *Bradley* explained, even if a state statute places arbitration on "equal footing" with litigation, it is preempted by the FAA if it invalidates only certain types of clauses in certain types of contracts. *See id.*

The Fifth Circuit applied similar reasoning in *OPE International LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001) (per curiam). There, the appellant argued that the arbitration agreement in question was invalid under a Louisiana statute that voided out-of-state forum-selection

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[2] The California statute at issue in *Bradley* provided that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." Cal. Bus. & Prof. Code Ann. § 20040.5.

clauses in certain construction contracts. *See id.* at 446.[3] The Fifth Circuit disagreed, holding that a state law that places a requirement on arbitration clauses "not applicable to contracts generally" is preempted by § 2 of the FAA. *Id.* at 447. The Fifth Circuit held that the state statute, which did not "target" arbitration for special treatment, "'directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on comp-liance with a . . . requirement not applicable to contracts generally.'" *Id.* (quoting *Casarotto*, 517 U.S. at 687) (alteration omitted); *see also Commerce Park v. Mardian Constr. Co.*, 729 F.2d 334, 337 (5th Cir. 1984) (holding that state statute, which voided any waiver of rights under a state deceptive trade practices statute, was preempted by the FAA even though the state statute did not mention arbitration).

To the same effect is *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999). There, the First Circuit held that a Rhode Island statute applicable only to forum-selection clauses in franchise agreements was preempted by § 2 of the FAA because the state statute "[did] not apply to all contracts and [did] not establish a generally applicable contract defense." *Id.* at 52. Like the state statutes addressed by *Bradley* and *OPE International*, the Rhode Island statute at

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[3] The Louisiana statute at issue in *OPE International* rendered "null and void and unenforceable as against public policy any provision in a contract" for certain types of construction that required a "suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state." La. Rev. Stat. Ann. § 9:2779.

issue in *KKW Enterprises* voided any provision in a franchise agreement restricting venue to an out-of-state forum. *See id.* at 50.[4] The First Circuit reasoned that only state statutes that apply to "any contract" are consistent with the FAA. *Id.* at 50-51. "Because [the state statute] limits the statute's application to one type of provision, venue clauses, in one type of agreement, franchise agreements, the statute does not apply to any contract." *Id.* at 51. Therefore, the First Circuit held that the Rhode Island statute was preempted by the FAA. *Id.*

Similarly, in *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999) (No. 98-630), the Second Circuit held that § 2 of the FAA preempted a rule of law established by the Supreme Court of New Jersey in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996), in which the state high court found that a forum-selection clause in a franchise agreement was presumptively invalid under the New Jersey Franchise Practices Act if the clause designated an out-of-state judicial forum. The franchisee in *Hamilton* argued that the state-law precedent should be extended to invalidate such forum-selection clauses as they related to arbitration. *See* 150 F.3d at 163. The Second Circuit rejected the franchisee's argument, explaining:

> *Kubis* did not establish a "generally applicable" contract defense that applies to "any" contract;

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[4] The Rhode Island statute at issue in *KKW Enterprises* read: "A provision in a franchise agreement restricting jurisdiction or venue to a forum outside this state is void with respect to a claim otherwise enforceable under this act." R.I. Gen. Laws § 19-28.1-14.

> it invalidated a franchise agreement's forum selection clause under the New Jersey Franchise Practices Act because it required the franchisee to sue in another jurisdiction. The *Kubis* decision applies to one sort of contract provision (forum selection) in only one type of contract (a franchise agreement). Therefore, to the extent that *Kubis* can be read to invalidate arbitral forum selection clauses in franchise agreements, it is preempted by the FAA.

Id.; *see also Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1024-26 (7th Cir. 2003) (overturning district court order denying a "stay [of] litigation in favor of arbitration" and holding that Illinois statute governing contracts between brewers and distributors was preempted because it did not apply generally to all contracts).

These cases demonstrate that four federal courts of appeals have applied the unambiguous language of § 2's savings clause to hold that courts may not refuse to enforce arbitration agreements based on state-law grounds other than "grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). A state law that invalidates only certain types of clauses in certain types of contracts is not a "ground[] that exist[s] at law or in equity for the revocation of any contract," and therefore any such state law is preempted by the FAA to the extent that it precludes enforcement of arbitration agreements.

Because INHCA's anti-waiver provisions invalidate only certain types of clauses (waivers of the right to commence an action under INHCA and to have such cases tried by a jury) in certain types of

contracts (agreements subject to INHCA), well-established circuit precedent demonstrates that the savings clause of § 2 does not apply and the Appellate Court of Illinois's ruling is erroneous.

III. THE PETITION RAISES SUBSTANTIAL QUESTIONS OF FEDERAL LAW

"The 'singling out' theory"—whereby courts hold that a state statute must "target" or "single out" arbitration agreements in order to be preempted by the FAA—is best viewed as a "backdoor attempt to have the Supreme Court overrule *Southland*, which it already has refused to do." Christopher R. Drahozal, Federal Arbitration Act Preemption, 79 Ind. L.J. 393, 410 (2004) (Drahozal). Professor Drahozal correctly observes that the "'singling out' phrasing comes from language in Supreme Court cases, not from the [FAA] itself, and is contraindicated by other language in the Court's own opinions." *Id.* at 409 (footnotes omitted). Echoing the concern expressed by this Court in *Southland*, Professor Drahozal concludes that

> the "singling out" interpretation of FAA preemption would permit states to eviscerate the FAA entirely. Under that interpretation, a state law that invalidated all pre-dispute waivers of the right to jury trial would not be preempted by the FAA because it did not single out arbitration clauses: it also would invalidate jury trial waivers in court selection clauses. And yet such a state law would make arbitration agreements wholly unenforceable in the state, because by definition arbitration clauses provide for an arbitrator, rather than a jury, to resolve the parties' dispute. Nothing in

> the FAA or the Supreme Court's interpretations of the FAA supports such a result. In short, courts should reject the view that the FAA preempts only state laws that single out arbitration clauses.

Id. at 410 (footnotes omitted).

Contrary to the decision below, federal preemption analysis does not look solely to the language of the state statute to determine whether it is preempted by federal law. "[S]tate law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Nor is the state statutory language at issue here unique to Illinois. At least two other States have enacted virtually identical anti-waiver provisions in the nursing facility context. Oklahoma's Nursing Home Care Act, for example, provides that "[a]ny waiver by a resident or the legal representative of the resident of the right to commence an action under this section, whether oral or in writing, shall be null and void, and without legal force or effect." Okla. Stat. tit. 63, § 1-1939(D). In similar fashion, the Oklahoma statute also provides that "[a]ny party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force

or effect." § 1-1939(E); *see also* W. Va. Code § 16-5C-15(c) ("Any waiver by a resident [of a nursing facility] or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.").

Unlike the decision of the Appellate Court of Illinois in this case, however, the FAA has been held to preempt Oklahoma's identical anti-waiver provisions. In *Rainbow Health Care Center, Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321 (N.D. Okla. Jan. 29, 2008), a nursing facility filed suit against the head of a state regulatory agency seeking a declaratory judgment that Oklahoma's anti-waiver provisions were preempted by the FAA after the state agency threatened to revoke the plaintiff-facility's license because the plaintiff-facility included certain arbitration provisions in its admission agreements. See *id.* at *1. The district court held the FAA did in fact preempt Oklahoma's anti-waiver provisions, explaining: "In enacting the FAA, Congress expressed a national policy favoring enforcement of arbitration agreements, and there is nothing to suggest that Congress ever intended to carve out an exception to that broad policy allowing the state of Oklahoma to *disfavor* arbitration agreements in nursing home admission agreements." *Id.* at *8. The defendant-official did not appeal the district court's ruling.

A different federal district court in Oklahoma reached a similar conclusion in *Sooner Geriatrics, L.L.C. v. Crutcher*, No. CIV-07-244-M, 2007 WL 2900535 (W.D. Okla. Oct. 3, 2007). There, the district court granted several nursing facilities' request for a preliminary injunction after the same

state regulatory agency cited the plaintiff-facilities for including certain arbitration provisions in their admission agreements that the state agency believed violated Oklahoma's anti-waiver provisions. *See id.* at *6. The district court later converted its preliminary injunction into a permanent injunction after the defendant-official failed to contest the plaintiff facilities' motion to confess judgment, finding that the FAA preempted Oklahoma's anti-waiver provisions. *See Sooner Geriatrics, L.L.C. v. Crutcher*, No. CIV-07-244-M, slip op. (W.D. Okla. May 27, 2008). As in *Rainbow Health Care Center*, the defendant official in Sooner Geriatrics did not appeal the district court's ruling.

Despite these federal court rulings holding that Oklahoma's anti-waiver provisions are preempted by the FAA, Oklahoma's state courts have proven extremely hostile to claims that the FAA preempts Oklahoma's anti-waiver provisions. In *Bruner v. Timberland Manor Ltd. Partnership*, 155 P.3d 16 (Okla. 2006), the Supreme Court of Oklahoma upheld a trial court's refusal to enforce an arbitration agreement between a nursing facility and a resident after the trial court held the FAA did not preempt Oklahoma's anti-waiver provisions. To reach this result, the Bruner court applied an overly narrow construction of the FAA, finding that the FAA did not reach what the court characterized as the "profoundly local transaction" evidenced by the agreement between the nursing facility and its resident. *Id.* at 31. In doing so, the Bruner court expressly disagreed with contrary rulings issued by three other state supreme courts. *See id.* at 29-30 (disagreeing with *McGuffrey Health & Rehab. Ctr. v. Jackson*, 864 So. 2d 1061 (Ala. 2003); *Vicksburg*

Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005); and *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005)). *But see Rainbow Health Care Center*, 2008 WL 268321, at *6 (rejecting *Bruner*'s interstate commerce analysis); Stanley A. Leasure, Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way, 60 Okla. L. Rev. 737, 767-68 (2007) (questioning *Bruner*'s reasoning in light of contrary state supreme court rulings).

There is only one FAA, the interpretation of which should be uniform regardless of whether one sues in state court or in federal court. As *Rainbow Health Care Center*, *Sooner Geriatrics*, *Bruner*, and the decision below demonstrate, such is not the case in the context of arbitration agreements between nursing facilities and their residents.

This case implicates much more than just state statutes related to disputes between nursing facilities and their residents, however. This case — and the obvious disregard for this Court's FAA jurisprudence — implicates the very type of judicial hostility to arbitration § 2 of the FAA was designed to overcome. The "target" theory adopted by the court below represents the second front in state courts' efforts to circumvent this Court's FAA jurisprudence. *See* Drahozal, 79 Ind. L.J. at 410.

"[C]ourts must be on guard for artifices in which the ancient suspicion of arbitration might reappear." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989). The rule adopted by the Appellate Court of Illinois, whereby a state statute may avoid FAA preemption if a violation of public policy is a generally applicable contract defense and the state statute in question does not

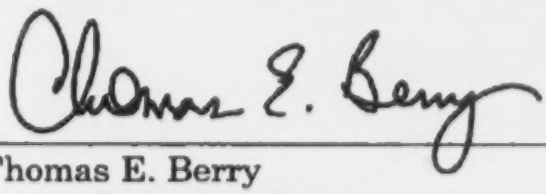
"target" arbitration agreements, is one such "artifice" that must be rejected outright lest the lower court's decision serve as a roadmap for how other state courts and state legislatures can frustrate the pro-arbitration policy choice made by Congress through the use of selective (and patently erroneous) parsing of this Court's FAA jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Appellate Court of Illinois. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the Appellate Court of Illinois.

Respectfully submitted.

SANDBERG PHOENIX & VON GONTARD P.C



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DECEMBER 2009

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MARTHA BLAZIER, Special Administrator of the Estate of RACHEL REEDY, Deceased,	)	**FILED**
	)	**Dec 20 2007**
	)	**Clerk of Circuit**
v.	)	**Court #68**
	)	**Madison County,**
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR and THOMAS B. SELDERS,	)	**Illinois**
	)	
	)	
	)	07-L-81
	)	
Defendants.	)	

ORDER

This cause came before the Court on November 16, 2007 for hearing on Defendant's Motion to Compel Arbitration. The Court has reviewed Defendant's motion, its Memorandum in Support thereof, Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel Arbitration, and Defendant's Reply to Plaintiff's Memorandum, as well as all cases cited by each party in their respective memoranda.

This Court has also heard and considered arguments of counsel for Plaintiff and Defendant on this issue. Having considered all of the foregoing, it

is the Order of the Court that Defendant's Motion to Compel Arbitration is hereby DENIED.

The Court finds that the Federal Arbitration Act (9 U.S.C. Section 2) does not preempt the provisions contained in the Illinois Nursing Home Care Act which specifically prohibit both a waiver of a right to sue and a waiver of the right to a trial by jury in cases brought pursuant to the Illinois Nursing Home Care Act. (See 210 ILCS, Sections 45/3-606 and 45/3-607).

SO ORDERED,

12/20/07
DATE

s/David Hylla
JUDGE

APPENDIX B

NO. 5-08-0011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARTHA BLAZIER, Special Administrator of the Estate of Rachel Reedy, Deceased,	)	**FILED** **Dec 22 2008** **Louis E. Costa** **Clerk Appellate Court, 5th Dist.**
Plaintiff-Appellee	)	
v.	)	Appeal from the Circuit Court of Madison County
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	No. 07-L-81
Defendant-Appellant	)	Honorable David A. Hylla, Judge, presiding.

SUMMARY ORDER

The above-styled cause is an interlocutory appeal by defendant, Beverly enterprises-Illinois, Inc., doing business as VIP Manor, appealing an order of the circuit court of Madison County denying its motion to compel arbitration. In the course of this appeal, plaintiff, Martha Blazier, special administrator of the estate of Rachel Reedy,

deceased, filed a motion pursuant to Illinois Supreme Court Rule 361(h) (210 Ill.2d R. 361(h)) to dismiss the appeal and remand to the circuit court, based on *Carter v. SSC Odin Operating Co., LLC*, 381 Ill. App. 3d 717, 885 N.E.2d 1204 (2008), decided by this court subsequent to the original briefing of this appeal by the parties. Defendant filed a response to this motion. We ordered supplemental briefing and heard oral argument,. We now affirm the order of the circuit court pursuant to Supreme Court Rule 23(c) (166 Ill. 2d R. 23(c)).

The essence of plaintiff's arguments in its motion is that *Carter* resolved the central issue in this appeal, namely, whether sections 3-606 and 3-607 of th4e Nursing Home Care Act (210 ILCS 45/3-606, 3-607 (West 2006) are preempted by the Federal Arbitration Act (9 U.S.C. §1 *et seq.* (2000)). We conclude that our decision in *Carter* resolved this question. *Carter* noted correctly that neither section of the Nursing Home Care Act targeted arbitration agreements, but a class of contractual agreements generally, whether arbitration or not, that effected a waiver of a nursing home resident's right to ether commence an action or assert the right to a jury trial. Thus the Nursing Home Care Act qualifies as a state law appropriately enacted to govern a contract's validity, revocability, and enforceability, as explained in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 1234 L. Ed. 2d 902, 116 S. Ct. 1652 (1996). Defendant's arguments, generally, against *Carter* and asserting that the Nursing Home Care Act is preempted according to *Doctor's Associates, Inc.* we find unconvincing. While defendant accurately notes that plaintiff's initial brief argues unconscionability, the determination by this court in *Carter* applies to

the issue in this case and is, therefore, an appropriate basis upon which to decide this appeal.

Accordingly, pursuant to Supreme Court Rule 23(c)(2) (166 Ill.2d R. 23(c)(2)), we affirm the circuit court's denial of defendant's motion to compel arbitration, and we remand the cause to the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, for further proceedings.

Affirmed; cause remanded.

GOLDENHERSH, J., with WEXSTTEN, P.J., and CHAPMAN, J., concurring.

APPENDIX C

NO. 5-08-0011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARTHA BLAZIER, Special Administrator of the Estate of RACHEL REEDY, Deceased,	)	**FILED Jan 28 2009 Louis E. Costa Clerk Appellate Court, 5th Dist.**
Plaintiff-Appellee	)	
v.	)	Appeal from the Circuit Court of Madison County
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	No. 07-L-81
Defendant-Appellant	)	

ORDER

This cause has been considered on defendant-appellant's petition for rehearing and application for a Supreme Court Rule 316 certificate of importance; and the court being advised in the premises;

IT IS THEREFORE ORDERED that the petition for rehearing and for certificate of importance shall be and the same hereby is, denied.

APPENDIX D

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

September 30, 2009

Mr. Jon W. Jordan
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No. 108114 - Martha Blazier, etc., respondent, v. Beverly Enterprises-Illinois, Inc., etc., petitioner.
Leave to appeal, Appellate Court, Fifth District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 4, 2009.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 3 of the United States Constitution (the Commerce Clause) provides, in pertinent part:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Sections 1 and 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-2, provide:

> **§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein

defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. The Illinois Nursing Home Care Act, Chapter 210, Act 45, Article III, Part 6 of the Illinois Compiled Statutes, provides, in pertinent part:

45/3-601. Liability to residents

§ 3-601. The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident.

45/3-602. Actual damages; costs and attorney's fees

§ 3-602. The licensee shall pay the actual dam ages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated.

45/3-603. Actions; injunctive and declaratory relief

§ 3-603. A resident may maintain an action under this Act for any other type of relief, including injunctive and declaratory relief, permitted by law.

45/3-604. Class actions

§ 3-604. Any damages recoverable under Sections 3-601 through 3-607, including minimum damages as provided by these Sections, may be recovered in any action which a court may authorize to be brought as a class action pursuant to the Civil Practice Law. The remedies provided in Sections 3-601 through 3-607, are in addition to and cumulative with any other legal remedies available to a resident. Exhaustion of any available administrative remedies shall not be required prior to commencement of suit hereunder.

45/3-605. Medical assistance; exemption of damages recovered

§ 3-605. The amount of damages recovered by a resident in an action brought under Sections 3-601 through 3-607 shall be exempt for purposes of determining initial or continuing eligibility for medical assistance under "The Illinois Public Aid Code", as now or hereafter amended, and shall neither be taken into consideration nor required to be applied toward the payment or partial payment of

the cost of medical care or services available under "The Illinois Public Aid Code".

45/3-606. Waiver of right to sue

§ 3-606. Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.

45/3-607. Jury trial; waivers

§ 3-607. Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

* * * * *

APPENDIX F

RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)

This Arbitration Agreement is executed by VIP MANOR (the "Facility") and RACHEL REEDY ("Resident" or "Resident's Authorized Representative", hereafter collectively referred to as "Resident") in conjunction with an agreement for admission and for the provision of nursing facility services (the "Admission Agreement") by Facility to Resident. The parties to this Arbitration Agreement acknowledge and agree that upon execution, this Arbitration Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act. It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is

hereby incorporated into this Agreement[5], and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement. However, this agreement shall not limit the Resident's right to file a grievance or complaint with the Facility or any appropriate government agency from requesting an inspection form such an agency or from seeking review under 42 C.F.R. section 431.200 *et seq.* of a decision to transfer or discharge the Resident.

The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including

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[5] Information about the National Arbitration Forum, including a complete copy of the code of Procedure, can be obtained from the forum at 800-474-2371, by fax at 651-604-6778 or toll-free fax at 866-743-4517, or ion the internet at http://www.arb-forum.com.

any prerequisites to, credit against, or limitations on, such damages. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the facility, and all persons whose claim is derived through or on behalf of the Resident including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident. The parties further intend that this agreement is to survive the lives or existence of the parties hereto.

All claims based in whole or part of the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose and should reasonably have been discovered prior to the date upon which notice of arbitration is given to the Facility or received by the Resident and such claim is not presented in the arbitration proceeding.

THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTI-

TUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.

The resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement ma be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

The undersigned certifies that he/she has read this Arbitration Agreement and that is has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this agreement and accept its terms.

Date: 11-9-05

Signature: s/Rachel Reedy

Witness: s/Lacie Walters

If the resident is unable to consent or sign this provision because of physical disability or mental incompetence or is a minor and an authorized representative is signing this provision, complete the following:

Date: _____

Relationship to Resident: _____

Signature: _____
(Authorized representative)

Witness: _____

For Facility:

Date: _____

Authorized Representative
Signature: _____

Print Name and Title: _____

APPENDIX G

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MARTHA BLAZIER, SPECIAL ADMINISTRATOR OF THE ESTATE OF RACHEL REEDY, DECEASED,	)	
Plaintiff,	)	Cause No. 07-L-81
v.	)	
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	
Defendant.	)	

STATE OF CALIFORNIA	)	
	)ss.	
COUNTY OF FRESNO	)	

AFFIDAVIT OF JULIANNE WILLIAMS-VINK

I, Julianne Williams-Vink, having been first duly sworn, depose and say upon personal knowledge:

I am an adult over the age of eighteen years. I submit this affidavit in connection with the Motion to

Compel Arbitration submitted by Defendant Beverly Enterprises-Illinois, Inc.

2. I am the President of Beverly Enterprises-Illinois, Inc.

3. Rachel Reedy was admitted as a resident to VIP Manor on November 9, 2005, and remained at the facility until February 13, 2006.

4. Ms. Reedy's nursing care at VIP Manor was paid for by the federal Medicare program. Medicare paid $22,320.67 for Ms. Reedy's nursing care during her admission at VIP Manor. VIP Manor's requests for Medicare payments for services rendered to Ms. Reedy went to United Government Services, located in the State of California, and Medicare payments were processed by a Beverly bank account located in the State of New York.

5. In 2005, the Medicare program paid $1,003,125.00 for 4,735 patient days of nursing care provided to various residents at VIP Manor, and in 2006, it paid $966,858.00 for 3,883 patient days. In 2005, the Illinois Medicaid Program paid $1,815.575.00 for care to residents at VIP Manor, and in 2006, it paid $1,819,350.00. The Illinois Medicaid Program is partially funded by the federal government.

6. Linens, laundry, and maintenance to the facility are provided by Healthcare Services Group, located in Pennsylvania. Various equipment and supplies are provided by companies situated in Wisconsin, Georgia, Texas, California, Pennsylvania, Minnesota, and Missouri. Companies located in Colorado and Ohio supply videos and magazines for the residents' use at the facility. Companies located in Missouri, Biological Technology Lab Inc., Gamma

Healthcare Inc., and biotech X-Ray Inc., provide lab and x-ray services for residents at the facility.

7. Recruiting for the facility staff occurs through HotJobs.com, located in New Jersey, and Jobs in LTC Inc., located in South Carolina. The facility's staff periodically travels from Illinois to Texas to receive computer training. Marketing and advertising of the facility is conducted by Retzke & Associates Inc., located in Wisconsin, and Gustin Advertising, located in Massachusetts. Financial services are provided by AVAYA Financial Services, located in New Jersey. Delivery services are provided by Federal Express Corp., located in Pennsylvania.

s/Julianne Williams-Vink
Julianne Williams-Vink

Subscribed and sworn to before me this 25th day of June 2007.

By: Julianne Williams-Vink
~~Personally known to me or~~ proved to me on the basis of satisfactory evidence to be the person(~~s~~) who appeared before me, Linda Neelen, Notary Public. s/L.N.

s/Linda Neelen
Notary Public

Linda Neelen
Comm. #1682027
Notary Public-
California
Fresno County
My Comm. Expires
July 20, 2010

APPENDIX H

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MARTHA BLAZIER, Special Administrator of the Estate of RACHEL REEDY, Deceased,	)	**FILED**
	)	**2007 Jan 25**
	)	**PM 2:37**
	)	**Clerk of Circuit**
v.	)	**Court**
	)	**Third Judicial**
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR and THOMAS B. SELDERS,	)	**Circuit**
	)	**Madison County,**
	)	**Illinois**
	)	
	)	07-L-81
Defendants.	)	

COMPLAINT

COUNT I

COMES NOW the plaintiff, MARTHA BLAZIER, Special Administrator of the Estate of RACHEL REEDY, Deceased, by her counsel, the Law Office of Robert H. Gregory, P.C., and complaining of the defendant, BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR, states:

1. Plaintiff brings this cause of action pursuant to Chapter 210 ILCS 45/3-601 and 602.

2. Rachel Reedy was a resident of VIP Manor Nursing Home, Wood River, Madison County, Illinois at all times relevant hereto.

3. Martha Blazier is the duly appointed Special Administrator of the Estate of Rachel Reedy and as such as authorized to bring this sit on behalf of the Estate, as evidenced by the Letters of Office, attached hereto as Exhibit A.

4. On February 13, 2006, Rachel reedy was admitted to Alton Memorial Hospital in Alton, Illinois with diagnoses in relevant part of decubitus ulcers and gangrene of the left foot.

5. That the defendant, by and through its employees, agents and servants acting within the scope of their employment, then and there owed a duty to Rachel Reedy to exercise ordinary care so as not to cause her injury, but that in spite of said duty, the defendant, by and through its agents, servants and employees, was then and there guilty of one or more of the following negligent acts or omissions:

a) failed to properly notify and consult with decedent's treating physician regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status, in violation of 42 CFR Ch. IV §483.10(b)(11)(B);

b) failed to properly notify decedent's next o kin regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status, in violation of 42 CFR Ch. IV §483.10(b)(11)(B);

c) failed to properly notify and consult with decedent's treating physician regarding the need to discontinue the existing form of treatment rendered to decedent and/or to commence a new form of treatment for decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(C);

d) negligently failed to care for the decedent in a manner which maintained and enhanced the decedent's dignity and qualify of life, in violation of 42 CFR Ch. IV §483.15(a);

e) negligently failed to employ sufficient staff to provide adequate personal care, nursing care, and supervision to its residents, including decedent, which resulted in the deterioration of decedent's physical condition and her death, in violation of 77 Ill.Adm. Code §§300.810, 300.1230

f) failed to timely report the abuse and/or neglect and/or injury of the decedent to the Department o Public Health of the State of Illinois, in violation of 77 Ill. Adm. Code §300.690;

g) failed to provide the necessary care and services to the decedent to attain or maintain the highest practicable physical, mental and psychological well-0being of the decedent, in violation of 77 Ill.Adm. Code §300.121(a);

h) negligently violated its own resident care policies by failing to provide

necessary care and services to the decedent, in violation of 77 Ill.Adm. Code §300.610(a);

i) failed to implement a regular program to prevent and treat the decedent's pressure sores by providing treatment and services to promote healing and prevent infection, in violation of 77 Ill. Adm. Code §300.1210(b)(5).

6. That one or more of the foregoing negligent acts or omissions proximately caused injury to Rachel Reedy as hereinafter alleged.

7. Such conduct on the part of defendant's agents, servants, or employees violates the Nursing Home Care Act.

8. That Rachel Reedy, while a resident of defendant's long term care facility, was allowed to develop severe decubitus ulcers and gangrene of her left foot. Consequently, she suffered a marked deterioration of her prior physical condition and she thereafter died of those injuries on February 18, 2006. By reason of her injuries, the Estate of Rachel Reedy became liable for large sums of money for nursing care and attention, physician, hospital and other bills in and about endeavoring to become healed and cured of her injuries. She suffered great pain and anguish as a result of said injuries all to her damage in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

9. Plaintiff, as Special Administrator of the Estate of Rachel Reedy, seeks herein all damages to which the Estate may be entitled under the Illinois Nursing Home Care Act (210 ILCS 45/3-601,

et seq.), and the Illinois Wrongful Death Act (740 ILCS § 1801/1, et seq.).

WHEREFORE, plaintiff, MARTHA BLAZIER, as Special Administrator of the Estate of RACHEL REEDY, demands judgment against defendant, BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR, for a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00), for costs of suit, and for such other and further relief as the court deems just.

COUNT II

COMES NOW the plaintiff, MARTHA BLAZIER, Special Administrator of the Estate of RACHEL REEDY, Deceased, by her counsel, the Law office of Robert H. Gregory, P.c., and complaining of the defendant, THOMAS B. SELDERS, states:

1. Plaintiff brings this cause of action pursuant to chapter 210 ILCS 45/3-601 and 602.

2. Rachel Reedy was a resident of VIP Manor Nursing Home, Wood River, Madison County, Illinois at all times relevant hereto.

3. Defendant, upon information and belief, is a resident of Collinsville, Madison County, Illinois.

4. Martha Blazier is the duly appointed Special Administrator of the Estate of Rachel Reedy and as such as authorized to bring this sit on behalf of the Estate, as evidenced by the Letters of Office, attached hereto as Exhibit A.

5. On February 13, 2006, Rachel reedy was admitted to Alton Memorial Hospital in Alton, Illinois with diagnoses in relevant part of decubitus ulcers and gangrene of the left foot.

6. That the defendant, as Administrator of the defendant's long-term care facility was charged with the general administration and supervision of defendant's facility and, as such, then and there owed a duty to the decedent to exercise ordinary cares so as not to cause her injury. but that in spite of said duty, the defendant was guilty of one or more of the following negligent acts or omissions:

a) failed to properly notify and consult with decedent's treating physician regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status, in violation of 42 CFR Ch. IV §483.10(b)(11)(B);

b) failed to properly notify decedent's next of kin regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status, in violation of 42 CFR Ch. IV §483.10(b)(11)(B);

c) failed to properly notify and consult with decedent's treating physician regarding the need to discontinue the existing form of treatment rendered to decedent and/or to commence a new form of treatment for decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(C);

d) negligently failed to care for the decedent in a manner which maintained and enhanced the decedent's dignity and qualify of life, in violation of 42 CFR Ch. IV §483.15(a);

e) negligently failed to employ sufficient staff to provide adequate personal care, nursing care, and supervision to its residents, including decedent, which resulted in the deterioration of decedent's physical condition and her death, in violation of 77 Ill.Adm. Code §§300.810, 300.1230

f) failed to timely report the abuse and/or neglect and/or injury of the decedent to the Department o Public Health of the State of Illinois, in violation of 77 Ill. Adm. Code §300.690;

g) failed to provide the necessary care and services to the decedent to attain or maintain the highest practicable physical, mental and psychological well-being of the decedent, in violation of 77 Ill.Adm. Code §300.1210(a);

h) negligently violated its own resident care policies by failing to provide necessary care and services to the decedent, in violation of 77 Ill.Adm. Code §300.610(a);

i) failed to implement a regular program to prevent and treat the decedent's pressure sores by providing treatment and services to promote healing and prevent infection, in violation of 77 Ill. Adm. Code §300.1210(b)(5).

j) failed to ensure that all employees of the defendant facility were familiar with the applicable regulations under 77 Ill.Adm. Code referenced herein and

that said regulations were met in the facility, in violation of 77 Ill.Adm. Code 300.510(e).

7. That one or more of the foregoing negligent acts or omissions proximately caused injury to Rachel Reedy as hereinafter alleged.

8. Such conduct on the part of defendant's agents, servants, or employees violates the Nursing Home Care Act.

9. That Rachel Reedy, while a resident of defendant's long term care facility, was allowed to develop severe decubitus ulcers and gangrene of her left foot. Consequently, she suffered a marked deterioration of her prior physical condition and she thereafter died of those injuries on February 18, 2006. By reason of her injuries, the Estate of Rachel Reedy became liable for large sums of money for nursing care and attention, physician, hospital and other bills in and about endeavoring to become healed and cured of her injuries. She suffered great pain and anguish as a result of said injuries all to her damage in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

10. Plaintiff, as Special Administrator of the Estate of Rachel Reedy, seeks herein all damages to which the Estate may be entitled under the Illinois Nursing Home Care Act (210 ILCS 45/3-601, et seq.), and the Illinois Wrongful Death Act (740 ILCS § 1801/1, et seq.).

WHEREFORE, plaintiff, MARTHA BLAZIER, as Special Administrator of the Estate of RACHEL REEDY, demands judgment against defendant, BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR, for a sum in excess of FIFTY

THOUSAND DOLLARS ($50,000.00), for costs of suit, and for such other and further relief as the court deems just.

Respectfully submitted,

LAW OFFICE OF ROBERT H. GREGORY, P.C.

s/Robert H. Gregory
Robert H. Gregory IL# 03122358
Attorney for Plaintiff
970 E. Airline Drive, Suite 3
East Alton, IL 62024
PH: 618-258-7226
FAX: 618-258-7430